

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Modern Rules of Procedure )  
for the Issuance of Advisory Opinions )  
in Nature of Service Proceedings )

Docket No. RM2012-4

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
INITIAL COMMENTS ON NOTICE OF  
PROPOSED RULEMAKING  
(July 29, 2013)**

On May 31, 2013, the Commission issued Order No. 1738, "Notice of Proposed Rulemaking Regarding Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661." The deadline for comments was set as July 29, 2013. *See 78 Fed. Reg.* 35812 (June 14, 2013). This Order follows Commission Order No. 1309, "Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases under 39 U.S.C. 3661," issued April 20, 2012 in this same docket. In response to Order No. 1309, Valpak submitted Initial Comments on June 18, 2012,<sup>1</sup> and Reply Comments on July 17, 2012,<sup>2</sup> which Valpak incorporates by reference. Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") jointly submit the following initial comments.

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<sup>1</sup> <http://www.prc.gov/Docs/83/83080/Valpak%20Initial%20Comments.pdf>.

<sup>2</sup> <http://www.prc.gov/Docs/83/83606/Valpak%20RM2012-4%20Reply%20Comments.pdf>.

## GENERAL COMMENTS ON PROPOSED REGULATIONS

The Commission's proposed rules seek to severely compress the N-docket process in order to meet a Commission self-imposed 90-day timeline<sup>3</sup> — a drastic reduction from the practice in prior dockets. There have been five N-dockets in the five years, all since passage of the Postal Accountability and Enhancement Act ("PAEA"). Valpak has participated in each of these dockets (except Docket No. N2012-2), submitting Initial and Reply Briefs in each, and has generally been supportive of the Postal Service's proposals. Yet, for the reasons set out herein, Valpak opposes this effort to cut short intervenor participation, even if the Postal Service believes that a rapid Advisory Opinion process would help the Postal Service cut costs more quickly. The Commission has never demonstrated that participants could have a fair opportunity to participate, and that the Commission could have a reasonable time to prepare an Advisory Opinion, within 90 days. The last five N-dockets took from 5 months to 12 months to complete, except for Docket No. N2012-2, Post Office Structure Plan. However, that one docket really is no precedent for expedition whatsoever, as it was effectively a continuation of Docket No. N2011-1, the Retail Access Optimization Initiative, 2011.

1. Docket No. N2009-1, Station and Branch Optimization and Consolidation Initiative, 2009 — Duration: 8 months  
[Valpak Initial Brief](#)  
[Valpak Reply Brief](#)  
[Advisory Opinion](#) — March 10, 2010

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<sup>3</sup> Order No. 1738 states: "Proposed section 3001.72 provides that the Commission shall issue its advisory opinion no later than 90 days after the filing of the Postal Service's request unless the Commission makes a determination of good cause for extending the 90-day deadline. A determination of whether good cause exists would, of necessity, be case specific. The Commission is, however, committed to issuing advisory opinions within 90 days of filing." P. 23.

2. Docket No. N2010-1, Six-Day to Five-Day Street Delivery and Related Service Changes, 2010 — Duration: 12 months  
[Valpak Initial Brief](#)  
[Valpak Reply Brief](#)  
[Advisory Opinion](#) — March 24, 2011
3. Docket No. N2011-1, Retail Access Optimization Initiative, 2011 — Duration: 5 months  
[Valpak Initial Brief](#)  
[Valpak Reply Brief](#)  
[Advisory Opinion](#) — December 23, 2011
4. Docket No. N2012-1, Mail Processing Network Rationalization Service Changes, 2012 — Duration: 9.5 months  
[Valpak Initial Brief](#)  
[Valpak Reply Brief](#)  
[Advisory Opinion](#) — September 28, 2012
5. Docket No. N2012-2, Post Office Structure Plan — Duration 3 months  
[Advisory Opinion](#) — August 23, 2012

The length of an N-docket case depends primarily on (i) the complexity of the Postal Service's proposed changes and (ii) the completeness of the Postal Service's presentation. Yet, under the Commission's proposed procedural schedule, the 90-day deadline exists irrespective of either factor. By way of illustration of the extreme nature of the proposed rules, rebuttal cases must be filed within 42 days after the Postal Service's request is filed. Initial briefs could be due as early as 49 days if there is no rebuttal.

In truth, there is no one size which fits all Nature of Service dockets. The Commission's new 90-day deadline has two clear victims: the right of participants to participate and the quality of the Commission's Advisory Opinion. The question arises as to why the Commission now embraces a fixed 90-day period (subject to extension for good cause). At least three factors could be involved.

First, the Commission came under criticism from Congress for having taken 12 months to consider and then render an ambivalent advisory opinion in Docket No. N2010-1, Six-Day to Five-Day Street Delivery and Related Service Changes, 2010, a proposal which Valpak supported.

Second, Senator Tom Carper, Chairman of the Senate Committee on Homeland Security and Government Relations, filed comments urging that Commission rules conform to a fixed (but not 90-day) deadline — a proposal contained in a Senate bill which is not law.<sup>4</sup> Nonetheless, Nature of Service dockets are the only Administrative Procedures Act (“APA”) formal rulemaking left under PAEA, indicating that Congress wanted to protect the due process rights of participants in the last law that it passed, and this continues to be the law.

Third, the Postal Service has made incomplete presentations at the outset of many N-dockets and other dockets, an unhelpful practice which is encouraged by the Commission declining to require the Postal Service to make complete initial presentations, putting the burden on participants to file discovery to flesh out the Postal Service case, and thus causing

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<sup>4</sup> S. 1010, 112th Congress, section 206, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01010:>.

delay.<sup>5</sup> In other dockets, some cases evolved even after filing, such as in Docket No. N2011-1, where the Postal Service indicated that it would update its filing as the case progressed.<sup>6</sup>

It is encouraging that the Commission rules would include a provision (Section 3001.80(c)) under which, “[i]f at any time the Commission determines that the Postal Service’s request is incomplete or that changes made subsequent to its filing significantly modify the request, the Commission may extend the deadlines established or take any other action as justice may require.” However, any incomplete, or evolving, filing should be returned to the Postal Service, with the regulatory clock reset to zero, and the rules should expressly include this option.

Although expedition from the time taken in prior N-dockets is certainly possible, the Commission rules would sacrifice the due process rights of participants, in violation of the APA. *See generally* Docket No. RM2012-4, Valpak Initial Comments, pp. 9-12. Although PAEA made many changes to Title 39, it left the provision on Advisory Opinions prior to significant service changes practically untouched, merely updating the Commission’s name. 39 U.S.C. § 3661(b)-(c). These Nature of Service dockets are the only procedures remaining under title 39 which demand a “**hearing on the record under [5 U.S.C.] sections 556 and**

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<sup>5</sup> The postal reform bill recently reported out of the House Committee on Oversight and Governmental Reform (H.R. 2748) appears to have recognized the Commission’s failure to require that the Postal Service make a complete and proper initial filing. That bill contains a provision (Section 702) which seemingly encourages the Commission to avoid repeating the mistakes of the past. Under this provision, the Commission expressly would be authorized to reject incomplete filings, sending the matter back to the Postal Service.

<sup>6</sup> *See* Docket No. N2011-1, Postal Service Request (July 27, 2011), p. 2.

557,” triggering what is often referred to as a **formal rulemaking**. Categorically limiting the scope of rebuttal cases to the Postal Service’s proposal, and not permitting alternatives, is not within the Commission’s power. The APA requires that participants be allowed to present their own views, and that is a statutory right which the Commission cannot waive. *See, e.g.*, 5 U.S.C. § 556(d) (“A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”). It should be enough that the APA requires the Commission to grant meaningful rights to participants. However, the wisdom underlying the APA rule allowing participants to file the comments they want to file has been demonstrated by the helpful alternatives to Postal Service proposals that have been advanced in the course of recent N-dockets (*e.g.*, what became the PostPlan in Docket No. N2012-2 was originally presented by a participant as an alternative in the Retail Access Optimization Initiative in Docket No. N2011-1).

### COMMENTS ON SPECIFIC PROPOSED REGULATIONS

Valpak’s comments follow what the Commission describes as the “principal elements” of the proposed rules:

- A requirement that N-Cases conducted within a fixed time period provide a **pre-filing phase** during which a free and open exchange of information is conducted;
- Revised filing requirements intended to confirm that information was freely exchanged during the pre-filing period and which **encourage submission of a complete and final service change proposal**;

Comment: The Commission notes, “the Postal Service states that absent any actual limits on N-case procedures, it is not a foregone conclusion that this head start would actually

reduce the time spent on discovery and witness preparation. Postal Service Reply Comments at 12.” Order No. 1738, p. 11. Indeed, as some Postal Service filings have been made based on incomplete and developing information, there is little reason to believe that the Postal Service will be in a position to disclose material information about the nature of a proposal before it is finalized and filed. Further, the Postal Service generally takes the position that nothing is final until approved by the Governors, which also would render this requirement futile, doing nothing to shorten the period of litigation. Lastly, if past performance is any indication of the future, the Postal Service will be reluctant to share key information until absolutely required to do so.

Since the Commission appears to understand that a 90-day limit is far too short without a truly meaningful pre-filing phase, and there is no reason to believe that a pre-filing period will yield anything meaningful, it would be better to adapt to that reality now by jettisoning a fixed 90-day litigation period.

- The issuance of an initial notice and scheduling order based upon a **pro forma procedural schedule** that provides for completion of the proceeding within a **fixed time period**;

Comment: *See* General Comments, *supra*, as to the wisdom of a fixed 90-day schedule.

- Elimination of the “limited participator” status in N-Cases;

Comment: Agreed.

- Expedited filing deadlines for filing and responding to motions;

Comment: Agreed.

- New N-Case discovery procedures that build upon the pre-filing conference and which include a provision for an **initial mandatory technical conference**; a **limitation on the number of written interrogatories**; and the continued use of document requests, and requests for admissions traditionally used in connection with hearings conducted on the record;

Comment: Again, there is no reason to believe that a technical conference for N-dockets will be any more useful than such conferences have been for other types of dockets. Generally, the Postal Service begins technical conferences by laying down ground rules as to the type of questions which its personnel may answer. If these same rules are again used, Postal Service personnel will explain what they did, and refuse to discuss why, rendering it highly unlikely that these technical conferences will have the value the Commission anticipates.

Comment: There should be no limitation on the number of written interrogatories, unless there is a corresponding limit on the scope of any one N-docket and the length of the filing of the Postal Service. Certainly, the notion that, during a pre-filing period and a pre-filing technical conference, the Postal Service will be forthcoming about its proposal is utopian, without any support in the annals of Commission proceedings. It certainly cannot be a rationale for limiting discovery.

- Revised procedures for prompter access to non-public materials;

No Comment.

- The **expedited filing of rebuttal and surrebuttal** testimony, if any;

Comment: Rebuttal testimony cannot be filed before participants have a reasonable opportunity to review and analyze a complete and certain/unchanging Postal Service proposal. This takes time. Any effort to cut short the period for preparation of such a case will only

serve to reduce the quality of that testimony, impairing the participant's ability to criticize the Postal Service's case.

Comment: Surrebuttal testimony would be filed almost exclusively by the Postal Service. If the Postal Service demands the last word, through the filing of surrebuttal testimony, that decision should operate to suspend the 90-day rule for as long as it takes to receive and evaluate that testimony. If the Postal Service wants a quicker decision, it can forgo having the last word.

- A process by which participants elect to file rebuttal testimony and a **restriction on rebuttal cases that limits the scope** of such cases to material issues relevant to the specific proposal made by the Postal Service in its advisory opinion request;

Comment: First, the Commission has no right under the APA to tell mailers and others what they may and may not say. If a mailer has a better idea than the Postal Service as to how to make a cost-cutting change, this rule would make that better idea subject to a motion to strike by the Postal Service. If participants are unable to make such comments as are appropriate to each docket, the N-dockets will have the form of due process, but not the substance.

Had rules such as those proposed herein been in place in the past, it would have impaired the Commission's work. For example, in Docket No. N2011-1, the Table of Contents in the Commission's Advisory Opinion contains a section entitled "VI. USE OF ALTERNATE METHODS TO ACHIEVE GOALS" (pp. 64-81). The Postal Service's initial proposal to close many thousands of small post offices was so problematic that the Postal Service itself ultimately withdrew its initial plan in favor of a completely revised plan to retain small post offices but reduce hours of operation so as to be more in line with actual recorded

workload — all thanks in no small part to alternatives presented and analyzed in the N-docket process and the Advisory Opinion.

As another illustration, the more recent Mail Processing Network Rationalization Service Changes, Docket No. N2012-1, was replete with alternatives presented by intervenors, as well as by the Commission's own two witnesses. The Postal Service claimed to be trying to optimize its mail processing network, but it failed to use standard state-of-the-art optimization techniques when developing its proposal. There are few, if any, absolutes in this game — *i.e.*, almost everything is relative to alternatives. How does one make a meaningful critique of a proposal such as that submitted by the Postal Service without discussing that there is another, better way? It is not enough to say that a proposal is unwise, and then be compelled by Commission rules to stop speaking and not make a persuasive point — but this is exactly what the Commission rules would require. Consideration of alternatives, including alternative ways to analyze the data presented by the Postal Service, goes to the very heart of developing a quality, informed opinion.

The process of intervening in N-dockets and presenting better alternatives allows mailers to help save the Postal Service from ill-conceived ideas. After all, the Postal Service has no money to spend that is not provided by mailers. As a regulated monopoly, the Postal Service cannot be granted the power to reduce service to mailers while, under these rules, mailers are muzzled. The Postal Service seems to view consideration of alternatives as delaying the hearing process, but the Postal Service really seems to view them as an intrusion into its managerial prerogatives. If the Commission were to accept that view, and believe that

an Advisory Opinion was such an intrusion, as these rules could be read to do, it would abrogate its statutory role, and the Postal Service monopoly would go unregulated.

- A limitation on the filing of **surrebuttal** cases that requires a **prior Commission determination** that exceptional circumstances make the filing of a participant's proposed surrebuttal necessary;

No Comment.

- The **elimination**, in most cases, of **field hearings**;

Comment: Valpak suggested abolition of field hearings in its initial comments filed on June 18, 2012.<sup>7</sup> In Docket No. N2011-1, Retail Access Initiative, field hearings dragged out the docket without creating any record evidence on which the Commission could rely.

- Revised hearing procedures providing for **back-to-back hearings** for the Postal Service's direct case, rebuttal testimony, if any, and surrebuttal testimony, if any;

Comment: This proposed rule would be unworkable. It is highly likely a participant would not have a full understanding of the Postal Service case until the end of cross-examination, with no time to prepare and file a rebuttal case, if rules provide for back-to-back hearings. (This problem would be exacerbated by any limit on interrogatories.)

- The implementation on a case-by-case basis of **limitations on cross-examination** to factual issues relevant to the Postal Service's proposal;

Comment: Order No. 1738 states that:

Hearings will be expedited by limiting cross-examination to material issues **relevant** to the Postal Service's proposal. **Cross-examination** that seeks to explore **alternative proposals** will **not be permitted**. Such proposals will, if appropriate, be considered in special studies or new public inquiry proceedings. [Order No. 1738, p. 22 (emphasis added).]

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Valpak Initial Comments, pp. 6-7.

Valpak opposes this proposed rule, for the same reason that it opposes limitations on the submission of alternatives or variants to Postal Service proposals. Moreover, as a practical matter, based on 36 years of experience in observing Commission proceedings, such a rule likely would shorten cross-examination measured in minutes, not hours. It also would lead to lengthy debate as to how to distinguish “factual” from “non-factual” issues, which could consume more time than having the questions answered.

As a hypothetical to test the proposed rules, assume that the Postal Service has filed a request for an Advisory Opinion, and an intervenor wants to question a Postal Service witness about some alternative way (or methodological technique) of analyzing or interpreting the data on which the witness relied. Assume further that the Postal Service lawyer objects on grounds that the examining lawyer is seeking to explore some alternative. It would appear that such cross-examination would be prohibited by this proposed rule — a terrible result for everyone, except the Postal Service.

- **A limitation on the length of initial and reply briefs** and the adoption of an expedited schedule for filing such briefs; and

Comment: The Postal Service has an unlimited number of pages to explain its proposal when filed, including testimony. Therefore, the real limit of this rule is on mailers, not the Postal Service. Brief length has not been abused in the past, and the Commission should not adopt the type of limits that are used by Courts of Appeals. The Commission has five members, a legal staff and a professional staff, completely unlike the federal judiciary. Surely someone can have the time to consider the full views of mailers when service is being reduced by the Postal Service.

- The adoption of a policy of issuing **advisory opinions** that are targeted more precisely to the Postal Service’s proposals and, when appropriate, instituting **special studies** that explore related subjects. [Order No. 1738, pp. 9-10 (emphasis added).]

Comment: The Commission concludes its general discussion, just before the Section-by-Section analysis with the following statement:

As an additional means of expediting N-Cases, the Commission proposes to follow a policy of limiting the scope of its advisory opinion to the changes in postal services proposed by the Postal Service. While alternative changes might be **noted**, they **would not be evaluated**. If, in any proceeding, alternatives or related issues of significant importance arise, the Commission may, in its discretion, undertake an evaluation of such alternative or issues by means of **special studies**, public inquiry proceedings, or other appropriate means. [Order No. 1738, p. 23 (emphasis added).]

It is beyond reason as to why the Commission would seek to constrain the scope of all of its future Advisory Opinions, in the abstract, by rule. The reason the Commission conducts N-dockets is to share its expertise with the regulated monopoly, the Postal Service, which has strong motivation to reduce service while charging the same prices. If the Commission has a good idea to suggest to the Postal Service, this rule would make unlawful the inclusion of that good idea into an Advisory Opinion.

Comment: Commencing special studies of potentially pertinent alternatives to N-docket proposals after the issuance of an Advisory Opinion, and Postal Service actions to implement that change in the Nature of Service, comes too late — akin to closing the barn door after the horses are long gone.

## CONCLUSION

Order No. 1738 observes (at 8) that “the goal of N-Cases is not simply to issue prompt opinions, but **to issue meaningful opinions that adequately address relevant issues.**”

(Emphasis added.) Valpak agrees. In view of this objective, the Commission should reevaluate its proposed rules and make the changes supported above. The Commission should design rules designed to achieve the twin objectives of (i) encouraging meaningful participation by mailers and others, rather than discouraging it, and (ii) establishing a procedure which would lead to the issuance of a thoughtful Advisory Opinion, rather than rules which can only lead to a weak analysis or a rubber-stamp approval of whatever the Postal Service proposes.

Respectfully submitted,

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